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The Multilateral Trade Negotiations, Subsidies, and the *Great Plains Wheat* Case

The Tokyo round of the Multilateral Trade Negotiations was concluded and agreements on most subjects of negotiation were submitted to participating governments on April 12, 1979. The modifications made by the Tokyo round to the General Agreement on Tariffs and Trade (GATT) represent a significant improvement in the terms which regulate subsidies.

In 1978 the European Economic Community (EEC) significantly increased its wheat exports. Its sales usurped several traditional American export markets, resulting in a loss of sales to those particular markets by U.S. farmers. The American share of the total world wheat market, however, remained virtually unchanged from past years.

Prior to the 1979 GATT amendments, violations were measured by loss of "world" market share, but the amendments changed the definitions by which violations are gauged. The *Great Plains Wheat* case, seeking sanctions against the EEC, arose just prior to the conclusion of the Tokyo talks. This article will focus on the alterations in GATT's subsidy terms and the effect that the changes will have on future cases like the one brought by Great Plains Wheat.

1. History of the General Agreement on Tariffs and Trade

Realizing that some of the origins of the Great Depression and the Second World War lay in trade conflicts among nations, the executive branch of the U.S. government began to develop plans in the early 1940s for an elaborate world organization to ease these tensions in the post-war era.[1] To

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[1] J. JACKSON, WORLD TRADE AND THE LAW OF GATT § 2.2 at 37 (1969) [hereinafter cited as WORLD TRADE].

achieve this goal, the United States drafted a charter for the proposed International Trade Organization (ITO).[2] The General Agreement on Tariffs and Trade began in 1946–47 as a specific trade agreement to institutionalize tariff concessions as a part of the ITO structure.[3]

The original terms of GATT were completed in October, 1947,[4] and the final terms of the ITO were finished in March, 1948.[5] The ITO was not approved by Congress,[6] and the State Department announced in December, 1950, that it would not be resubmitted.[7] Nevertheless, the president committed the United States to GATT as an executive agreement.[8]

Congress exhibited great hostility to GATT in its early years. In 1951, for example, Congress imposed import quotas on fats, oils, and some dairy products, in violation of United States GATT duties.[9] This act required the government to seek a waiver of its GATT obligations. Since other nations had little choice but to accede to U.S. demands or risk losing GATT and its benefits altogether, the waiver was granted in 1955.[10] The waiver has been a source of significant irritation between the United States and other GATT countries since that time.

Substantial amendments were made to GATT in 1955. These changes clarified and improved the trade rules considerably, but still left much to be desired. Many of the proposals and additions made during this session represented an attempt to transfer to GATT the provisions and functions of the ill-fated ITO.[11] Along with the changes made in GATT, this session approved the Organization for Trade Cooperation (OTC) to administer GATT.[12] Unfortunately, the OTC received the same treatment by Congress as the ITO, and U.S. involvement was prohibited.[13]

Congress's attitude has undergone a change in recent years, as reflected in the enactment of the Trade Expansion Act of 1962, allowing the president to participate in the Kennedy round of negotiations.[14] These negotiations were begun in May, 1964, and concluded in June, 1967.[15] Antidumping rules and tariff cuts averaging 35 percent were agreed upon.[16]

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[2]*Id.* at 40.
[3]*Id.* § 2.3 at 42-43.
[4]*Id.* at 45.
[5]*Id.* § 2.5 at 49.
[6]*Id.* at 50.
[7]U.S. State Dep't Press Release, December 6, 1950, *printed in* 23 DEP'T STATE BULL. 977 (1950).
[8]Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250, 253-54 (1967). *See* 61 Stat. pt. 6, at A2051 (1947), Presidential Proclamation No. 2761A, 12 Fed. Reg. 8863 (1947).
[9]65 Stat. 75 (1951).
[10]WORLD TRADE, *supra* note 1, § 27.6 at 735.
[11]*Id.* § 2.5 at 51.
[12]*Id.*
[13]*Id.*
[14]76 Stat. 872, 19 U.S.C. §§ 1801-1991 (1962).
[15]THE TRADE DEBATE at 7 (Department of State Publication 8942 1979).
[16]*Id.*

The Tokyo round of negotiations began in February, 1975, and ended in April, 1979, with the signing of further amendments interpreting and implementing the provisions of GATT.[17] The president negotiated the Tokyo round under the broad authority granted him by the Trade Act of 1974.[18]

The Tokyo round was the seventh in a series of GATT negotiations, the first of which culminated in the signing of the original GATT provisions in 1947.[19] It was also the most ambitious, involving ninety-nine countries and more crucial trade issues than any previous trade talks in history.[20] Past negotiations had focused primarily on tariff reductions, but as reductions were made, nations began to turn to non-tariff measures to restrain imports.[21] The Tokyo negotiations were aimed largely at controlling non-tariff restrictions to international trade.[22] Historically, the seven rounds of GATT negotiations could be described as the working out of international trade tensions that disrupted world commerce so ruinously in the 1930s. They have resulted in the adoption of the present rules, which ensure that each country and its industries will have fair access to the channels of world commerce.

2. Subsidies and the General Agreement on Tariffs and Trade

GATT as originally concluded in 1947 did not restrict the use of subsidies by governments.[23] It merely required signatories to report on the use of subsidies and to consult with one another to attempt to limit the subsidies if they resulted in or threatened serious prejudice to other contracting parties.[24] An importing nation could counter a subsidy with special duties if it caused or threatened material injury to an established domestic industry of the importing country.[25] Exporting nations harmed by a contracting party's use of subsidies could suspend the application to the other party of its obligations or concessions under GATT if the suspension was approved by a majority of the signatory countries acting jointly.[26]

The 1955 amendments to GATT created separate rules for the use of subsidies on primary and nonprimary products. Subsidies on nonprimary (e.g., industrial) products were banned if they resulted in exports priced lower than the same goods in the domestic market.[27] Parties were also

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[17]MTN: MULTILATERAL TRADE NEGOTIATIONS at 5 (Department of State Current Policy 56 [Revised] April 1979).
[18]*Id.* at 2.
[19]*Id.* at 1.
[20]*Id.* at 5.
[21]THE TRADE DEBATE, *supra* note 15, at 7-8.
[22]*Id.* at 8.
[23]61 Stat. A51, art. XVI (1947).
[24]*Id.*
[25]*Id.*, Art. VI, at A23.
[26]*Id.*, Art. XXIII, at A64.
[27]Text published in Appendix A, WORLD TRADE, *supra* note 1, art. XVI, § B, ¶ 4, at 828.

implored to avoid subsidies on primary products (e.g., agricultural and mineral products); but if applied, they could not be applied in a manner resulting in a party having more than "an equitable share of world export trade in that product," considering the market shares of the parties in a previous representative period and any special factors affecting trade in the product.[28] Nonprimary products are any goods other than primary products. Primary products are defined as:

> . . . any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.[29]

The condemnation of subsidies on primary products encompasses not only export subsidies but also production subsidies that have the effect of increasing exports.[30]

The amendments provided little guidance for determining what was more than a country's equitable share of world export trade. It did include a statement in the interpretive notes that a contracting party which had not exported a particular product in the previous representative period was not precluded from establishing its right to obtain a share of international trade in that product;[31] but beyond this provision, the broad language of the agreement provided no help in construing the nebulous and undefined concept of "equitable share." Furthermore, the agreement's language focused primarily on the beneficial effect to the exporting country granting the subsidy rather than on the harmful effects to competing exporters or importers.[32] The term "previous representative period" was not defined and created many difficulties, as did the determination of what special factors were and which ones could be considered. Finally, the language "world export trade" indicated that a country's equitable share was to be measured by looking at the entire world market and not at any individual market.[33] This was confirmed in 1959 by a Working Party report discussing Australia's allegations that French wheat exports to Southeast Asia rose because of the use of subsidies.[34] The ambiguities, broad language, and focus of the agreement made it very difficult to prove a case based on subsidies sufficient to obtain official sanctions.

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[28]*Id.*, Art. XVI, § B, ¶ 3, at 828.

[29]*Id.*, Annex I, Notes and Supplementary Provisions to Article XVI, § B, at 872.

[30]WORLD TRADE, *supra* note 1, § 15.7, at 393.

[31]WORLD TRADE, *supra* note 27, Annex I, Notes and Supplementary Provisions to Article XVI, ¶ 3, No. 1, at 872.

[32]The provision prohibits application of a subsidy "in a manner which results in that contracting party having more than an equitable share of world export trade in that product . . . ." WORLD TRADE, *supra* note 27, art. XVI, § B, No. 3, at 828. The language of the Treaty did not prohibit application of the subsidy in a manner resulting in a contracting party being deprived of an equitable share of trade in the relevant product.

[33]WORLD TRADE, *supra* note 1, § 15.7, at 394-95.

[34]*Id.*

3. Previous GATT Subsidy Cases

In the period from 1947 to 1969, over sixty GATT complaints were filed.[35] At least thirteen of them involved subsidies.[36] Only one resulted in approval given by GATT signatories to a contracting party's suspension of concessions granted to another party pursuant to GATT. In 1951, Congress amended the Defense Production Act of 1950 to require import quotas on oils, fats, and some dairy products. The Netherlands filed a complaint against the United States with GATT and received authority for many years to impose a limit of 60,000 metric tons annually on its imports of wheat and flour from the United States.[37] Professor Jackson has pointed out that this suspension was ineffective as a remedy because the effect on the United States was negligible.[38]

In one of the earliest GATT cases, Chile filed a complaint against Australia in 1949 because of the removal of a subsidy by Australia.[39] Australia subsidized two different but essentially interchangeable fertilizers. It had bound itself to Chile to grant a tariff-free status for one. When Australia removed the subsidy on this fertilizer but left intact the subsidy on the second, price elasticity became a factor, and Chilean exports of fertilizer dropped. A Working Party of five nations determined that Australia had not breached the terms of GATT, but did hold that the benefits Chile thought would accrue to it under GATT had been nullified or impaired by Australia's actions and recommended that Australia either subsidize both or neither of the fertilizers.[40] The test enunciated by the Working Party for nullification or impairment rested upon whether Australia's removal of the subsidy on one fertilizer only "could . . . reasonably have been anticipated" by Chile during the negotiations for the concession.[41] The two governments eventually reached a settlement.[42]

In 1958 Australia complained about a French subsidy on wheat and flour exports.[43] The Working Party that considered this case concluded that France's total wheat exports rose during the relevant time period, and that this rise was almost entirely in the Southeast Asian market.[44] Even though it determined that a nation's equitable share is found by looking to the entire world market and not individual markets, it decided that France had violated the terms of GATT because its total market share had risen and recommended that France take appropriate action to see that its subsidies

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[35] *Id.* § 8.4, at 171.
[36] *Id.* § 15.4, at 379.
[37] *Id.* § 8.5, at 185.
[38] *Id.*
[39] *Id.* § 8.4, at 172-73.
[40] *Id.* at 173.
[41] *Id.*
[42] *Id.*
[43] *Id.* § 15.4, at 380.
[44] *Id.* § 15.7, at 395.

did not adversely affect Australian exports to Southeast Asia.[45] A bilateral settlement was reached and the matter closed.[46]

Denmark brought a complaint against United Kingdom subsidies on eggs and cattle in 1957 claiming that Danish exports to the U.K. had been reduced and that they threatened other Danish export markets.[47] The U.K. assured Denmark that its subsidies were not designed to increase exports and agreed to take steps to prevent exports based on these subsidies.[48] As a result of these assurances, the case was settled.[49]

A complaint was filed against the United States by Malawi in 1967,[50] claiming that the United States maintained export subsidies on tobacco.[51] The Working Party formed to study the matter reached no conclusion on the legality of the alleged subsidy, and the case was never settled because the United States representative was not given authority to make any commitments.[52] Other complaints involving subsidies include a Greek charge in 1952 that the United States imposed export subsidies on sultanas; a 1953 Italian and South African complaint that the U.S. provided export subsidies on oranges; a Danish attack on U.S. export subsidies on poultry in 1956; and a 1958 Australian complaint against Italian export subsidies on flour.[53]

4. Subsidies and the Tokyo Round

The Tokyo round provisions implementing and interpreting the older and more general GATT rules also strengthened them. Article 9 places an absolute ban on the use of subsidies for nonprimary products.[54] Article 10 retains the old "equitable share" test of the legality of subsidies on primary products,[55] but adds two important paragraphs.

Paragraph 2 of Article 10 says that "more than an equitable share of world export trade" includes the displacement of another signatory's exports, considering developments in the world market.[56] This is one of the more important new provisions. The language changes the focus slightly so as to deemphasize the effect on the exporting party granting the subsidy. Displacement is a direct reference to the effect on the subsidizing exporter's competitors. More importantly, displacement implies an effect in a particular area, such as a country or region, instead of the entire world market. Market share, the standard arising from the 1955 GATT provisions, is the

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[45] *Id.*
[46] *Id.* § 15.4, at 380.
[47] *Id.*
[48] *Id.* at 381.
[49] *Id.*
[50] *Id.* § 15.7, at 395.
[51] *Id.* § 29.3 at 765.
[52] *Id.*
[53] *Id.* § 15.4, at 379-80, n.15.
[54] Text published in 18 INT'L LEGAL MATERIALS 579, 599 (May 1979).
[55] *Id.* Art. 10, ¶ 1, at 599.
[56] *Id.* Art. 10, ¶ 2(a), at 600.

more appropriate test when considering effects on the general world market. Displacement, a more definite concept, refers to particular transactions and markets. Any other interpretation of this word would read it out of the Tokyo terms and leave the signatories with the old provisions from which they have attempted to escape.

The requirement for consideration of developments on world markets is troublesome and yet necessary for use of the displacement test. The language indicates that the shares of the parties during the previous representative period and the displacement itself are not to be given automatic effect but are to be balanced against recent developments and trends in particular markets. It allows the committee of signatories some discretion to consider the nature and extent of the subsidy and the needs of the exporting nation and to balance these factors against the effects of the subsidy on competing exporters. This construction makes sense, considering that sovereign nations are the subject of the inquiry, and they must of necessity maintain sufficient freedom to protect their vital national interests in times of need.

The second part of this paragraph provides that traditional patterns of supply to a country, region, or world market must be considered when determining "equitable share" in new markets.[57] The specific reference to national and regional markets adds strength to the conclusion that the Tokyo provisions change the focus from market shares in the general world market to displacement in specific markets. In the context of this paragraph, "shall be taken into account" does not mean that established market shares in the country, region or world markets should be automatically projected onto the new market and fixed. It means, rather, that such a projection should be the starting point in making the required determination. Displacement should remain the primary test in new markets, albeit to a lesser degree than in established markets with set suppliers.

The term "previous representative period" is defined more concretely in the last part of this paragraph than in the earlier GATT rules.[58] It is the three most recent calendar years in which normal market conditions existed.[59] This is straightforward except for one obvious problem. What are "normal market conditions"? They might be determined by reference to an averaging of trade in a prior representative period. Instead of mechanistically using trade averages, the better approach, when possible, would be to consider conditions that affect the volume of supply and demand and measure them not against a previous statistical average, but against their previous usual effects on supply or demand. Thus, an early frost may not change the average temperature or number of frosts for an area, but it may kill crops and reduce the volume of available supply. Nevertheless, statistical averaging can be a useful starting point to which other factors can be added.

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[57] *Id.* Art. 10, ¶ 2(b), at 600.
[58] *Id.* Art. 10, ¶ 2(c), at 600.
[59] *Id.*

The third paragraph of Article 10 is also significant. It prohibits export subsidies on primary products from being granted in a manner resulting in prices materially below those of other suppliers to the same market.[60] Several problems are presented by this paragraph. For example, at what point should a price be considered materially below that of other suppliers? The question of when a subsidy results in materially lower prices is also raised by this section. Does a preexisting subsidy become illegal under this provision if normal market forces push competitors' prices significantly upward? The answer should depend on whether the subsidy concerns only a one-time transaction or is continuing. If the subsidy continues at the same level for future transactions in addition to ones already under contract, then the subsidy should be covered by this section.

Another problem concerns what prices the subsidized price is to be measured against. If the subsidized price is so low that no one bids against it, then is there a price against which to judge whether it is materially lower? The answer must be yes. A conclusion that a much lower price was not materially below other suppliers because no one bid against it would lead to absurd results. Furthermore, subsidized prices may drive down normal market prices and lead to a detrimental price war. This may make it difficult or even impossible to determine if a subsidized price is materially low. Subsidized prices should be judged against the most recent series of unsubsidized prices in a given market before the subsidized price was offered, provided that these unsubsidized prices were not set in response to earlier subsidized prices.

It is doubtful that a single measurement, such as five percent, could be devised that would be commonly accepted to determine what is a "materially" lower price. In some industries, ten or twenty percent might not be materially lower, while one or two percentage points might be materially lower in other industries. Percentages can be a helpful starting point in this analysis, but one must also look to the nature of the industry involved and its traditional pricing and trading patterns. Elasticity of supply and demand in response to specified pricing changes are important factors and should be considered. But if the information concerning the trading in question and the most recent pattern of unsubsidized trading is sufficiently telling, the determination can be made from data readily available in order to eliminate the detrimental effects of subsidies as quickly as possible without waiting for a full-scale investigation of world trading patterns in the product involved.

5. The *Great Plains Wheat* Case

It is in this setting that the *Great Plains Wheat* case arose in 1978. Great Plains Wheat, Inc. (GPW) is a nonprofit organization sponsored by wheat commissions in nine states, whose primary objective is the development,

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[60] *Id.* Art. 10, ¶ 3, at 600.

maintenance, and expansion of U.S. wheat exports in Latin America, Europe, the Middle East, and Africa.[61] On November 2, 1978, Great Plains Wheat filed a complaint with the chairman of the Section 301 Committee of the Special Trade Representative's Office.[62] The Section 301 Committee is an ad hoc committee composed of representatives from various interested government agencies. The complaint described the European Economic Community's subsidies on wheat exports and requested the president to "take all appropriate and feasible steps," including retaliatory countermeasures, to obtain the elimination of these subsidies.[63]

Section 301 of the Trade Act of 1974 was codified in Section 2411 of Title 19 of the United States Code before it was changed by the Trade Agreements Act of 1979. Section 301 provided that if the president, acting through the International Trade Commission or the Special Trade Representative, found that a foreign nation provided subsidies on its exports to the U.S. or to foreign markets and the subsidies resulted in a substantial reduction of U.S. sales to those markets, then the president had to take retaliatory action such as the imposition of countervailing duties or the suspension of trade benefits or concessions.

The Trade Agreements Act of 1979 altered Section 301 so that it would comply with the terms of GATT. Section 2411 of Title 19 has been significantly rewritten, and Sections 2412, 2413, 2414, 2415, and 2416 have been added. With these changes, the taking of retaliatory actions by the president is discretionary,[64] but upon request for such action[65] the Special Trade Representative must determine what action, if any, to recommend to the president.[66] If an investigation is initiated, the Special Trade Representative must seek consultations with the foreign government involved.[67]

According to the Great Plains Wheat complaint, the EEC, as part of its Common Agricultural Policy (CAP), provides two types of restitutions (i.e., subsidies) on wheat exports.[68] First, the community establishes and publishes current export subsidies on wheat for specific regions.[69] Second, the EEC export tender system provides subsidies on wheat exports to regions or countries not designated under the other system.[70] Competitive bids under which the traders specify the lowest subsidy they are willing to accept in

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[61] Great Plains Wheat, Inc., Complaint, published at 43 Fed. Reg. 59,935 (1978). Great Plains Wheat, Inc., merged with Western Wheat Associates, U.S.A., Inc., in 1980, and adopted the common name of U.S. Wheat Associates, Inc.

[62] *Id.* There is presently no method by which private parties can directly bring actions within the dispute settlement process established by GATT; instead, they must rely upon their governments to protect their interests. *See* Jackson, *The General Agreements on Tariffs and Trade*, in I INT'L BUS. TRANSACTIONS at 51-52 (1977).

[63] Complaint, *supra* note 61, at 59, 936.

[64] 19 U.S.C. § 2411(b).

[65] 19 U.S.C. § 2412(a).

[66] 19 U.S.C. § 2414(a).

[67] 19 U.S.C. § 2413.

[68] *Id.*

[69] *Id.*

[70] *Id.*

order to export a given amount of wheat provide the specific means by which this system functions.[71]

Evidence submitted by Great Plains Wheat at the Section 301 hearing showed that world wheat prices in 1978 and 1979 averaged in the area of $3.85 per bushel or $141 per metric ton, while EEC domestic wheat, based on price supports, ranged almost twice as high.[72] Therefore, it took a subsidy of about $3.35 per bushel to make EEC wheat competitive in the world export market.[73] On wheat imported into the EEC, the community placed a levy of $142 per metric ton, thereby doubling the price of the wheat when sold within the EEC.[74] Revenues obtained from this extraordinarily high tariff were used to fund the community's subsidies on exports of surplus agricultural products.[75]

EEC wheat production increased from 38.5 million metric tons per year in the 1977–78 period to 47.0 million metric tons in the 1978–79 season as a result of high export prices (and good weather).[76] EEC wheat is closely akin to the three lower-quality U.S. wheats: hard red winter wheat, western white wheat, and soft red winter wheat.[77] These varieties have lower protein levels than the two classes of higher-quality U.S. wheats.[78] Some higher-quality wheat must be added to the lower-quality wheat for milling purposes, but the lower-quality wheat makes up the bulk of the finished product for many areas of the world.[79] Accordingly, the three lower-quality wheats are the more competitive strains.[80]

Because of the increased production, the community's increased wheat exports in 1978 amounted to about 4.4 million metric tons.[81] GPW estimated that most of this increase (about three-fourths of it) replaced U.S. sales.[82] As a result, the EEC percentage of world wheat exports jumped from seven percent to twelve percent,[83] but the U.S. worldwide percentage remained basically unchanged (in the 43 percent to 45 percent range).[84]

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[71]GPW Complaint, *supra* note 61, at 59,936.

[72]Letter of February 14, 1979, from Michael Hall, President of GPW, to the Chairman of the Section 301 Committee of the Office of the Special Trade Representative, at 5, published after p. 37 of the Testimony of Michael Hall during the Section 301 Hearings on the GPW Complaint.

[73]*See* Testimony of Michael Hall during the Section 301 Hearing on the GPW Complaint, at 47, 100.

[74]*Id.* at 61.

[75]GPW Written Brief, published at 43 Fed. Reg. 59,939 (1978).

[76]*Id.* at 59,937; Testimony of Michael Hall, *supra* note 73, at 72.

[77]Testimony of Michael Hall, *supra* note 73, at 43,118; Letter of February 14, 1979, *supra* note 72, at 4-5.

[78]Testimony of Michael Hall, *supra* note 73, at 118.

[79]*Id. supra* note 73, at 118-19.

[80]*Id.*

[81]GPW Complaint, *supra* note 61, at 59,936.

[82]*Id.*

[83]GPW Written Brief, *supra* note 75, at 59,937; Testimony of Michael Hall, *supra* note 73, at 101.

[84]GPW Written Brief, *supra* note 75, at 59,937; Testimony of Michael Hall, *supra* note 73, at 101.

Specifically, GPW alleged that EEC's heavily subsidized wheat took the following sales away from United States exporters in 1978:

1. EEC sold 50,000 tons of wheat to Brazil for a price of $3.67 per bushel, or $135 per metric ton. This included a subsidy of $3.27 per bushel or $120 per metric ton. Over 125,000 tons of United States wheat was rejected when offered at a price of $3.88 per bushel or $143 per metric ton f.o.b. Gulf ports.[85]

2. EEC sold 202,500 tons of wheat to Morocco at a price of $3.54 per bushel, or $130 per metric ton, f.o.b. French ports. Even though requested to do so by the Moroccans, no United States exporter offered a bid in response to the EEC tender because of the low price quoted.[86]

3. EEC sold 75,000 tons of wheat to Brazil at a price of $132.75 per metric ton f.o.b. French ports. U.S. wheat was offered in competition at $143 per metric ton, but this offer was rejected.[87]

In addition, many other sales of EEC wheat were made to Brazil, Morocco, Egypt, Portugal, Poland, the People's Republic of China, Chile, Finland, and Sri Lanka at much lower prices than competing U.S. wheat because of the high subsidies involved.[88] All of these countries represent traditional markets for U.S. wheat. In Morocco, the U.S. share of the wheat market fell from about 40 percent to 21 percent during 1978.[89]

EEC-subsidized exports caused losses of U.S. wheat exports of approximately 3.3 million metric tons.[90] Michael Hall, former President of GPW, estimated losses of U.S. export revenues in the range of $700 million to $1 billion.[91] The effect on the American economy goes well beyond mere lost revenues. Testimony at the GPW hearing revealed that over one million jobs in the United States are related to agricultural exports.[92] In 1978 U.S. agricultural exports amounted to $27.3 billion, producing a favorable trade balance in agricultural commerce of $13.4 billion.[93] Warren Lebeck, senior executive vice president of the Chicago Board of Trade, has said:

> [T]hese anti-competitive activities have contributed significantly to higher interest rates, a weaker dollar and inflation. Add to this the fact that if we were permitted to compete fairly, there would have been more jobs in export activities and it follows, a reduction in unemployment.[94]

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[85]Letter of December 7, 1978, from Michael Hall to Ambassador Robert S. Strauss, published at 43 Fed. Reg. 59,940, 59,941 (1978).

[86]*Id.*

[87]Letter of November 14, 1978, from Michael Hall to Ambassador Robert S. Strauss, published at 43 Fed. Reg. 59,941 (1978).

[88]*See* letter of December 7, 1978, *supra* note 85; letter of February 14, 1979, *supra* note 72; letter of December 18, 1978, from Michael Hall to Ambassador Robert S. Strauss, published at 43 Fed. Reg. 59,940 (1978); letter of November 27, 1978, from Michael Hall to Ambassador Robert S. Strauss, published at 43 Fed. Reg. 59,941 (1978).

[89]Letter of September 18, 1979, from Michael Hall to the GPW Board of Directors, at 2 (Quoting from the *Moroccan Quarterly Grain and Feed Report* (Aug. 23, 1979).

[90]GPW Complaint, *supra* note 61, at 59,936.

[91]Letter of February 14, 1978, *supra* note 72, at 6.

[92]Testimony of Warren W. Lebeck, senior executive vice president of Chicago Board of Trade, during the Section 301 Hearing on the GPW Complaint, at 25.

[93]*Id.* at 25-26.

[94]*Id.* at 30.

Discussing the attitude of U.S. farmers, the president of the National Association of Wheat Growers, Winston Wilson, stated:

> U.S. wheat producers depend on export markets for their livelihood, because two out of every three bushels produced must be exported to have a viable wheat economy. They have assessed themselves to develop overseas markets, idled acreage to prevent a supply glut, and stored excess supplies in reserve to build an inventory for future demand. They have taken the necessary market-oriented steps to improve the supply-demand equation for wheat, and their efforts ought not to be canceled by unfair competition in important foreign markets.[95]

GPW recommended that any or all of the following actions be taken against the EEC: (a) the imposition of import duties on goods entering the United States, (b) the creation of subsidies on exports of U.S. wheat to meet the EEC competition, and (c) the filing of a GATT complaint.[96] On June 8, 1979, the Special Trade Representative's Office issued a letter which concluded that GPW's complaint was valid.[97] It promised to hold discussions with the EEC and stated that "all appropriate efforts to protect" U.S. trade interests would be undertaken if EEC subsidies continued to cause lost U.S. wheat exports in the next marketing season. Thereafter, the Special Trade Representative announced that, after negotiations between the parties, the EEC was showing restraint in its export program, and the matter had been satisfactorily resolved.[98]

The community's response to the GPW complaint was informal. The EEC withdrew from the Brazilian market and indicated that its harvest would probably be much lower in the next market season and its exports correspondingly reduced. With this, the EEC considered the matter closed. The community also made it known that it considered the U.S. Section 301 process illegal under GATT.[99]

6. GATT, Section 301, and the Trade Agreements Act of 1979

Article VI of GATT allows countries to impose countervailing duties on the importation of subsidized goods, but only if the subsidy causes or threatens material harm to an established domestic industry or materially retards the development of a domestic industry.[100] Section 301 provisions were applied upon proof of the subsidy and a showing that substantial sales

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[95]Testimony of Winston Wilson, president of National Association of Wheat Growers, during the Section 301 Hearing on the GPW Complaint, at 130.

[96]Testimony of Michael Hall, *supra* note 73, at 61-63; Patterson, *Keeping Them Happy Down on the Farm*, 36 FOREIGN POLICY 63, 65 (1979).

[97]Letter of June 8, 1979, from Alan William Wolff, deputy special representative for Trade Negotiations, to Michael Hall.

[98]U.S. Wheat Associates, Inc., news release of July 25, 1980.

[99]Patterson, *supra* note 96, at 68.

[100]WORLD TRADE, *supra* note 27, art. VI, ¶ 6, at 811; Metzger, *Governmental Intervention in the International Competitive Process: Subsidies, Countervailing Duties, and "Voluntary" Agreements Restraining Imports*, 43 ANTITRUST L.J. 621, 623 (1974).

of U.S. products were reduced because of the subsidy.[101] Evidence of a substantial volume of lost sales is closely akin to proof of material harm and probably amounts to the same thing. The 1979 act did away with the mechanistic Section 301 approach and left the taking of such action solely at the president's discretion.

While GATT does not explicitly say that countermeasures must be authorized by the contracting parties acting jointly, this is the implication except for a few self-help provisions. Article 19 of the new Tokyo terms provides:

> No specific action against a subsidy of another signatory can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement.[102]

And Article 2 of the new rules says:

> Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Article.[103]

It is clear that under the newly revised GATT rules, unilateral action by the United States is improper, whether taken under the old Section 301 procedure or under the new provisions of the 1979 Trade Agreement Act, unless authorized by GATT.

As the Section 301 process was used by the government in the Great Plains Wheat case, the conflict was more theoretical than real. Once the requisite findings were made in the GPW case, the government held talks with the EEC. The talks were successful with respect to the immediate problems facing the parties, and the matter was held in abeyance to determine if the EEC subsidies would again surface and result in new problems. If they did and further talks were unsuccessful, then the United States would take the matter to the committee of signatories of GATT.[104] Only if this committee failed to respond adequately, the U.S. government having determined to act, would a conflict arise.

In this context, neither the Section 301 process nor the 1979 Act procedures, when used as an internal forum to initiate the GATT dispute settlement procedures, should be considered improper under GATT. They would be improper only if they actually resulted in unilateral action, ignoring or contravening the GATT process.

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[101] Before the Trade Agreements Act of 1979 became effective, 19 U.S.C. § 2411 provided, in pertinent part:

(a) Whenever the President determines that a foreign country or instrumentality—

(3) provides subsidies (or other incentives having the effect of subsidies) on its exports of one or more products to the United States or to other foreign markets which have the effect of substantially reducing sales of the competitive United States product or products in the United States or in those other foreign markets, . . . the President shall take all appropriate and feasible steps within his power to obtain the elimination of such restrictions or subsidies

. . . .

[102] Art. 19, ¶ 1, in 18 INT'L LEGAL MATERIALS 579, 612 (May 1979).

[103] Art. 2, ¶ 1, *id.* at 582.

[104] Letter of June 8, 1979, *supra* note 97.

The other response made by the EEC is that the use and application of CAP subsidies is an internal matter and does not come within the domain of GATT.[105] The EEC exports its surplus agricultural products in order to obtain foreign exchange reserves to finance oil imports.[106] It can export its farm products only if it subsidizes foreign sales. Since it fulfills an important EEC need, it is considered internal and non-negotiable.

This defense to a GATT complaint is untenable. A 1960 GATT Working Party drafted an illustrative list of practices generally considered as subsidies. One practice is "[T]he provision by governments of direct subsidies to exporters . . . ."[107] An annex to the terms adopted in the Tokyo round also provides an illustrative list of subsidies. The first item listed is "[T]he provision by governments of direct subsidies to a firm or an industry contingent upon export performance."[108] The other practices defined as subsidies are more subtle than those quoted above. The EEC restitutions fall within these very clear provisions and are prohibited by GATT. The exceptions to GATT listed in the general and security sections provide no basis for a claim that the restrictions are exempted.[109]

The only other defense that could be claimed by the EEC is that the subsidies have been continuing for years and have been accepted by the United States and other wheat exporting nations. This defense is similar to the waiver or estoppel doctrines in American law.[110] The answer to this argument is that the Tokyo provisions have changed and clarified the rules of the game and that there can be no acceptance or waiver of practices violative of the rules before they became effective. Any acquiescence in past practices is easily explained by the ambiguity of the old GATT rules, the fact that a showing of "equitable share" had to be made with reference to the entire world market, and the low level of previous EEC wheat exports as compared to exports in 1978.

7. Comparative Analysis of the *Great Plains Wheat* Case under GATT

Under the old GATT rules, it would be more difficult for the United States to prove a case. While the EEC's world market share increased in 1978 over the previous year, to obtain sanctions, the United States would have to prove that the increase constituted more than the EEC's "equitable share" of the entire world market and that 1977 or some other specified period was the representative period against which to measure the EEC's

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[105] Patterson, *supra* note 96, at 69. For a general discussion of CAP's relationship to GATT, *see* J. ALLEN, THE EUROPEAN COMMON MARKET AND THE GATT (1960).

[106] Patterson, *supra* note 96, at 69.

[107] WORLD TRADE, *supra* note 1, § 15.5 at 384-85.

[108] Annex (a) in 18 INT'L LEGAL MATERIALS 579, 615 (May 1979).

[109] *See* arts. XX & XXI in WORLD TRADE, *supra* note 27, at 839-41.

[110] An implied waiver may not actually be a defense since GATT makes no provision except for explicit waivers. *See* art. XXV in WORLD TRADE, *supra* note 27, at 846-47.

market share. The difficulties in defining "equitable share" and "previous representative period" become apparent in a concrete situation. Furthermore, under the old provisions, "special factors" affecting international trade in the particular product could be given greater weight because of the lack of specificity of the other terms. The EEC could argue with some force that the particularly good weather resulted in the unusually large harvest and that this was a special factor justifying the increased exports. Even though a GATT case might be proved under these circumstances, it is not a particularly strong case and justifies the government's decision to settle the matter informally.

Under the provisions of the Tokyo terms, the U.S. complaint would be much stronger. Displacement in particular markets is now the crucial test of what "equitable share" means. This measuring rod is relatively simple and easy to apply. The EEC subsidized exports clearly displaced some U.S. sales to Brazil and Morocco and probably to other traditionally strong U.S. markets as well. The EEC could argue that the good weather is a development in the world market or a special factor that should be considered. With the addition of the displacement test, special factors become less significant because of the concreteness of the displacement examination. Particularly good weather is a development that should be taken into account, but the high support payments probably had more to do with the increase in the harvest than did the weather. Many nations had larger than average crop yields in 1978 because of fine weather, but their export volume did not rise nearly as much as did the EEC's. In short, the displacement test makes a substantial difference in establishing a complaint.

The United States might also rely on another new provision—Article 10, paragraph 3. The world wheat market is extremely volatile and price elasticity, even in small shifts, is a significant factor. A price differential of eleven dollars per metric ton, as in the two specific sales of EEC wheat to Brazil noted earlier, is substantial and explains the change in suppliers. The price at which the EEC sold wheat to Morocco is also materially lower even though no bids were made against it. The EEC bid undercut previous prices in the market by several dollars per metric ton, and the difference in price was material to buyers in the world market.

8. Conclusion

The underlying issues that created the problem in 1978 remain to be resolved. A test of the legality of the EEC subsidies is likely in the coming years. The EEC's need for export revenues and the firmly entrenched position of subsidies in the CAP make it difficult for the community to discontinue the restitutions. The United States could hurt the EEC with certain countervailing duties, but the tensions that would be created and the likely response of the community make this a tough decision to embrace. The EEC could reciprocate in kind with injurious consequences to the United States. To prevent a return to the old days of unrestrained trade restrictions

and conflicts, the United States should choose its course of action carefully. Perhaps the best remedy that could be fashioned would be a voluntary agreement under which the EEC would restrain its level of export subsidies to traditionally strong U.S. markets and agree not to increase its price supports for wheat in a manner that would stimulate greater exports. The high stakes in the world trade game make the sacrifices on both sides necessary.